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No. 91-2075

In the Supreme Court of the United States

OCTOBER TERM, 1992

JEAN MARIE ST. GELAIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court was required to give petitioner's requested instruction that "good faith" was a defense to the wire fraud charges against him.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-14) is reported at 952 F.2d 90.

JURISDICTION

The judgment of the court of appeals was entered on January 14, 1992. A petition for rehearing was denied on March 31, 1992. Pet. App. 15-16. The petition for a writ of certiorari was filed on June 26, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted on six counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to 24 years' imprisonment, fined $1 million, and ordered to pay $12,120,244.29 in restitution. The court of appeals remanded for reassessment of petitioner's fine, but affirmed the judgment in all other respects. Pet. App. 1-14.

1. Petitioner submitted fraudulent documents to an insurance company to induce it to issue surety bonds on promissory notes; he then used the surety bonds to secure large loans from two financial institutions. Petitioner's scheme worked as follows: Petitioner created various limited partnerships allegedly for the purpose of oil and gas exploration and drilling. The investors in the partnerships were his son, his girlfriend, other individuals, and companies that he owned or operated that were worth little or nothing. Each investor supposedly contributed $37,000 cash and signed a promissory note to pay an additional $187,000. Petitioner fraudulently induced some investors to sign promissory notes and forged signatures on others. Pet. App. 2.

The next step in petitioner's scheme was to get the promissory notes bonded by a reputable company so that he could borrow against the notes. To this end, petitioner sent memoranda describing the purpose of the limited partnerships to Mutual Fire, Marine and Inland Insurance Company. He also sent the insurance company an "investor package" for each investor or limited partner that contained the individual investor's financial statement, a signed pledge agreement, and copies of the promissory note. In his own financial statement, petitioner misrepresented his assets. The financial statements petitioner submitted on behalf of the other in-

vestors grossly overstated the investors' assets. In many instances, the statements were not prepared by the investors in question and the signatures on the statements were forged. The insurance company, relying on these documents, bonded the promissory notes. *Ibid*; Gov't C. A. Br. 8-20.

Using the promissory notes as security, petitioner procured loans from Metropolitan Savings Bank and Anchor Savings Bank for the alleged purpose of gas and oil exploration and drilling. Those financial institutions wired more than $13 million to petitioner during the summer of 1984. Petitioner used most of those funds for unrelated business and personal purposes. The limited partners defaulted on the promissory notes. Mutual, having bonded the notes, partially paid the loss to the two financial institutions but eventually stopped paying due to its own insolvency. Pet. App. 2-3; Gov't C. A. Br. 4, 25-32.

2. At trial, petitioner did not present any evidence. At the conclusion of the evidence, petitioner requested the district court to give an instruction that "good faith" was a complete defense to the charges against him.[1] The

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[1] Petitioner asked the court to give the following instruction:

> Good faith is a complete defense to the charges in the indictment since good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness which is an essential part of the charges. The burden of proof is not on the Defendant to prove his good faith, of course, since he has no burden to prove anything. The Government must establish beyond a reasonable doubt that the Defendant acted with specific intent to defraud as charged in the indictment.
>
> One who expresses an opinion honestly held by him, or a belief honestly entertained by him, is not chargeable with fraudulent intent even though his opinion is erroneous or his belief is mistaken; and, similarly, evidence which establishes only

district court refused to give the instruction, finding that the defense of good faith was not supported by the evidence. Pet. App. 4.

In its closing charge, the district court instructed the jury:

> What must be proved beyond a reasonable doubt is that [petitioner] knowingly and willfully devised or intended to devise or join a scheme to defraud substantially the same as the one alleged in the indictment * * *.
>
> The word "knowingly" as that term has been used from time to time in these instructions means that the act was done voluntarily and intentionally and not because of mistake or accident.
>
> The word "willfully" as that term has been used from time to time in these instructions means that the act was committed voluntarily and purposely with the specific intent to do something the law forbids, that is to say, with bad purpose either to disobey or disregard the law.

Pet. App. 5. The court further instructed the jury that

> The words "scheme" and "artifice" include any plan or course of action intended to deceive others and to

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that a person made a mistake in judgment or an error in management, or was careless, does not establish fraudulent intent.

On the other hand, an honest belief on the part of the Defendant that a particular business venture was sound and would ultimately succeed would not, in and of itself, constitute "good faith" as used in these instructions if, in carrying out that venture, the Defendant knowingly made false or fraudulent representations to others with the specific intent to deceive them.

> obtain by false or fraudulent pretenses, representations, *or promises money or property from persons so* deceived.
>
> * * * * *
>
> A statement or representation is false or fraudulent within the meaning of this statute if it relates to a material fact and is known to be untrue or is made with reckless indifference as to its truth or falsity and is made or caused to be made with intent to defraud.
>
> * * * * *
>
> To act with intent to defraud means to act knowingly and with the specific intent to deceive, ordinarily for the purpose of causing some financial loss to another or bringing about some financial gain to one's self.

C.A. Record Excerpts 31.

3. The court of appeals affirmed petitioner's convictions. Pet. App. 1-14. The court rejected petitioner's claim that the district court committed reversible error by refusing to include a good faith instruction in the jury charge. The court declined to reach the question whether the evidence supported the defense of good faith, concluding instead that the instructions given adequately conveyed to the jury the concept of good faith. Pet. App. 4-6. The court further noted that, despite petitioner's assertion that the defense of good faith was not argued to the jury, defense counsel in closing argument

"put the concept of good faith and innocent motive before the jury." Pet. App. 6-7.[2]

ARGUMENT

Petitioner contends (Pet. 9-14) that the district court erred in refusing to give a separate instruction to the jury that he was not guilty of wire fraud if he acted in good faith. Contrary to petitioner's contention, the court of appeals correctly held that the instructions on willfulness, knowledge, and specific intent were adequate to guide the jury's deliberations without a separate good faith instruction.

1. In the context of criminal tax prosecutions, the Court has held that a separate instruction on good faith is unnecessary when the jury is adequately instructed on willfulness. *Cheek* v. *United States*, 111 S. Ct. 604, 610 (1991); *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam). Because willfulness in that context means "a voluntary, intentional violation of a known legal duty," the Court held that a willfulness instruction already incorporates the element of bad faith or evil motive. 111 S. Ct. at 610; see *Pomponio*, 429 U.S. at 12. The same principle has been applied more generally to criminal statutes requiring proof that the defendant acted with specific intent. As one court of appeals has explained, "where the court properly instructs the jury on the element of intent to defraud—essentially the opposite of good faith—a separate instruction on good faith is not required." *United States* v. *Dockray*, 943 F.2d 152, 155 (1st Cir. 1991). Accord *United States* v. *Gross*, 961 F.2d 1097, 1103 (3d Cir. 1992), petition for cert. pending, No. 92-205 (filed July 31, 1992); *United States* v. *McElroy*, 910 F.2d 1016, 1025-1026 (2d Cir. 1990); *United States* v.

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[2] The court remanded for resentencing because at the time petitioner committed wire fraud, the maximum fine authorized under 18 U.S.C. 1343 was $6,000. Pet. App. 11-12.

Hunt, 794 F.2d 1095, 1097-1098 (5th Cir. 1986); *United States* v. *Green*, 745 F.2d 1205, 1209 (9th Cir. 1984), cert. denied, 474 U.S. 925 (1985); *United States* v. *Gambler*, 662 F.2d 834, 837 (D.C. Cir. 1981); *United States* v. *Rothman*, 567 F.2d 744, 752 (7th Cir. 1977); cf. *United States* v. *McGuire*, 744 F.2d 1197, 1201, 1202 (6th Cir. 1984) (any error in failing to instruct on good faith was harmless because "[t]he instructions with regard to specific intent adequately informed the jury of the defendants' theory of the case"), cert. denied, 471 U.S. 1004 (1985).

The district court's instructions set forth in detail the requirements of willfulness, knowledge, and specific intent. The instructions clearly advised the jury that it could not convict petitioner unless it found that petitioner acted "purposely with the specific intent to do something the law forbids," and that he acted "knowingly and with the specific intent to defraud." Thus, the district court's instructions conveyed the essence of petitioner's proposed instruction that "good faith on the part of the Defendant is inconsistent with intent to defraud or willfulness" and that the government must establish "that the Defendant acted with specific intent to defraud as charged in the indictment."

2. Petitioner correctly observes that two courts of appeals require that a good faith instruction be given on request if it is warranted by the evidence even if the jury is instructed on willfulness and specific intent. Pet. 9-11 (citing *United States* v. *Casperson*, 773 F.2d 216, 223 (8th Cir. 1985); *United States* v. *Hopkins*, 744 F.2d 716, 718 (10th Cir. 1984) (en banc)). But as the First Circuit observed in *United States* v. *Dockray*, 943 F.2d at 155, "[i]f there is a discernible trend on this issue, it seems to be moving against the requirement of a separate instruction on good faith." In the years since the decisions in *Casperson* and *Hopkins*, the Fifth Circuit has abandoned its earlier ruling in *United States* v. *Goss*, 650 F.2d 1336

(1981), that a separate good faith instruction is required, see *United States* v. *Hunt*, 794 F.2d at 1098; *United States* v. *Rochester*, 898 F.2d 971, 978-979 (1990), and the First and Third Circuits have joined the other circuits in holding that where the court correctly instructs the jury on the element of intent to defraud, a separate instruction on good faith is not required. See *United States* v. *Dockray*, *supra*; *United States* v. *Gross*, *supra*.

In any event, this case does not present an opportunity to resolve the question whether district courts are required to give a separate instruction on good faith, because the evidence at trial did not support a theory that petitioner acted in good faith. The government's uncontroverted evidence established that petitioner, in furtherance of his scheme to secure large loans, submitted to the bonding company forged promissory notes or notes that he had fraudulently induced investors to sign. In addition, he submitted a financial statement on his own behalf that was false, and the financial statements that he submitted on behalf of other investors bore forged signatures and contained blatantly false representations. Moreover, most of the money that petitioner obtained through his fraudulent scheme was not spent for oil and gas exploration, but rather for unrelated business and personal purposes. Accordingly, if the jury believed that petitioner made the misrepresentations with which he was charged, there was no basis in the evidence from which it could have concluded that he acted in good faith, *i.e.*, that his conduct was the product of an honest mistake.

3. Petitioner is incorrect in contending (Pet. 11-14) that the district court precluded him from presenting a good faith defense to the jury. As the court of appeals correctly noted, petitioner's counsel implicitly raised the defense of good faith and innocent motive in his closing remarks to the jury. Pet. App. 6-7. Petitioner's

counsel argued that petitioner's disclosures regarding the purchase of a penthouse with the loan funds were "consistent with, not inconsistent with, open and honest dealing." Pet. App. 6. Moreover, defense counsel argued throughout closing argument that the business practices of 1984 were very different from the business practices of 1990. Those statements "impl[ied] that [petitioner] acted in good faith because he did not do anything that was unacceptable by 1984 standards." Pet. App. 6-7.[3]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[3] Petitioner suggests (Pet. 14) that the Court should grant certiorari to clarify whether the defense of good faith is subject to a standard of objective reasonableness. This case presents no occasion to resolve that question, however, since it was never raised in the court of appeals or the district court.